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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 74-6

ANCHOR MOTOR FREIGHT, INC.

Petitioner

v.

WILLIAM SCOTT

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Anchor Motor Freight, Inc., petitioner herein, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit, entered in this case on April 30, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported officially but reported unofficially at 73 CCH Labor Cases ¶14,502 and 86 LRRM 2190, appears in Appendix A hereto. The judgment of the United States District Court for the Northern District of Ohio, Eastern Division, which was not reported, appears in Appendix B.

JURISDICTION

The decision of the Court of Appeals was rendered on April 30, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Where an administrative agency (the Interstate Commerce Commission in this case) has exclusive and primary jurisdiction over an interstate truck line concerning health requirements of drivers, inter alia, and the violation of such requirements impairs continued operation of the company, may such compliance be submitted to a trial jury to predicate liability on the company by a driver claiming unjust discharge when in fact he was discharged for medical reasons pursuant to I.C.C. regulations.

2. Can an allegedly aggrieved employee and his labor union, by their action or inaction, waive an employer's right to receive notification of a pending grievance within the contractually

established time limit, where the time limits were bargained for and agreed to in contract negotiations and where the action or inaction of the employee and union subject the employer to economic losses without first giving the employer an opportunity to resolve the grievance in the manner contemplated by the parties to the agreement.

3. Is there a distinction between a decision granting a motion for leave to amend a pleading and a decision on the merits of the amended pleading.

4. Can the Court of Appeals remand only one issue of the case for a new trial when that issue is inextricably tied to the other issues of the case.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The following Statutes, Federal Rules and Regulations are involved, and are set forth in Appendix C hereto:

1. 29 U.S.C. §185.

2. 49 U.S.C. §304.

3. Rule 15, Federal Rules of Civil Procedure.

4. 49 Code of Federal Regulations, Part 291.

STATEMENT OF THE CASE

The plaintiff brought this action under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, alleging that he had been wrongfully discharged from his job as an interstate truck driver by his employer, Defendant Anchor Motor Freight, Inc., and that subsequently he did not receive fair representation from his union, Teamsters Local 377.

Anchor Motor Freight, Inc. is in the business of transporting automobiles by truck from the manufacturer to dealerships throughout the eastern part of the United States. Anchor is a motor carrier in interstate commerce, and as such is closely regulated by the Interstate Commerce Commission. One of the many facets of Anchor's business which is governed by I.C.C. regulations is the physical condition of Anchor's truck drivers.

The plaintiff, William Scott, was originally employed by Anchor as a truck driver in 1953. At that time Anchor operated a terminal in Norwood, Ohio. Scott worked out of Anchor's Norwood terminal until 1964, when the terminal was closed.

In 1966 Anchor opened a new terminal in Lordstown, Ohio, adjacent to General Motor's Lordstown plant. When the Lordstown terminal became operational, Anchor offered jobs to all of the drivers who had been laid off when the Norwood terminal was closed, in accordance with its labor agreement with the Teamsters Union. Among the Norwood drivers who

returned to work for Anchor in Lordstown was the plaintiff, William Scott.

Upon arrival at Lordstown, each driver was sent to Dr. Lewis Ralston for a physical examination. Dr. Ralston determined whether the driver met the minimum physical standards for drivers established by the Interstate Commerce Commission. Each driver who met the standards was certified by the doctor as qualified to drive, and was then put to work by the company.

The plaintiff was examined by Dr. Ralston on May 12, 1966. Dr. Ralston found that the plaintiff was diabetic, but he certified the plaintiff nevertheless. During the next two months the plaintiff began to exhibit symptoms of physical problems. As a result, Anchor sent the plaintiff back to Dr. Ralston for another, more thorough physical examination.

At this time Dr. Ralston requested a written interpretation of the I.C.C.'s medical standards for diabetic drivers. The company obtained this information from G.J. Baccei, District Supervisor of the Interstate Commerce Commission in Cleveland. In a letter to Dr. Ralston, Baccei quoted the medical authorities relied upon by the I.C.C., giving their views on whether a diabetic qualifies under minimum I.C.C. standards for drivers. One view expressed in the letter was that anyone other than "a very mild diabetic should be considered as an unsafe operator of a motor vehicle." The other view expressed in Baccei's letter was that a mild diabetic would be

acceptable, but that each case must be judged individually, based on the results of a thorough medical evaluation of the patient.

Based on his examinations of the plaintiff and on information contained in Baccei's letter, Dr. Ralston wrote to Anchor that Scott "has a severe to moderately severe diabetes," and that "this man represents a hazard to himself and others....As such, I question his employment as an over-the-road driver of motor vehicles."

After receiving Dr. Ralston's letter, Anchor decided that it was necessary to discharge Scott because he was no longer qualified to drive under the rules and regulations of the Interstate Commerce Commission. Scott was handed a discharge notice on July 23, 1966.

In the ensuing weeks and months Anchor officials did not receive any communications from Scott. The only inquiry made to the company concerning the Scott discharge was from Local 377 Business Agent Abe Schwartz to Anchor Terminal Manager E.E. Babiasz, who told Schwartz that Scott had failed to qualify under the I.C.C. rules and regulations and therefore Anchor had to terminate his employment. Anchor had no information that the plaintiff felt aggrieved by the discharge at that time.

Scott testified that he sent two "grievances" in the form of letters to Local 377 and to the International Brotherhood of Teamsters. One of these letters was allegedly a protest of his

discharge. His return receipts from the post office indicate that the letters were mailed on August 2 and were received by the union on August 4, 1966.

The case was tried in the United States District Court for the Northern District of Ohio, Eastern Division, before the Honorable Leroy J. Contie, Jr., and a jury. In special verdicts the jury found that Scott had been wrongfully discharged and that Local 377 did not fairly represent him, and awarded damages in the amount of $12,500 from Anchor and $12,500 from the union.

Both Anchor and Local 377 appealed these judgments. In addition, Scott appealed the district court's denial of his post-trial motion for an award of attorney fees in addition to the damages awarded by the jury.

In its appeal to the Court of Appeals for the Sixth Circuit, Anchor raised two major issues. The first of these issues was whether the discharge of an interstate truck driver can be deemed "wrongful" by a court and/or jury when the law (in this case, the Interstate Commerce Act and the regulations promulgated thereunder) precludes the continued employment of that driver unless he has been certified by an examining physician as meeting the minimum physical standards for drivers established by the Interstate Commerce Commission, and when the only examining physician to evaluate the driver stated that he did not meet these minimum standards. The Court of Appeals did not discuss the conflict between the absolute dictates of the Interstate Commerce Commission regulations

which prevented Anchor from employing a driver who did not meet the I.C.C.'s minimum physical standards and the decision of the jury in this case that Anchor acted wrongfully and without just cause when it discharged Scott. Rather than addressing itself to this issue, the Court of Appeals affirmed the District Court's position that it was for the jury to determine whether the discharge met the contractual just cause standard for discharge. The Sixth Circuit reached this conclusion notwithstanding the fact that the contract expressly required compliance with I.C.C. regulations for truck drivers. The I.C.C. in the absence of a contract likewise requires compliance. Compliance with the medical requirements of the I.C.C. is mandatory. However, the Court of Appeals merely held that the term "just cause" is an ambiguous term of the contract and that it is the jury's function to construe it. The court did not discuss the company's position when, as in the instant case, it is required by an administrative agency to act in a manner which the jury could later decide was wrongful.

The second major issue which Anchor presented to the Court of Appeals was whether Scott properly invoked the contractual grievance procedures. On this issue the Sixth Circuit divided two to one. The majority held that the contract was ambiguous as to when the ten day limit for filing a grievance begins to run and whether notice must be sent to the employer. On this basis the court upheld the court's instructions to the jury and the jury's determination. The dissent, however, felt that "ambiguity can be

found in the agreement only by a strained reading." Further, the dissent felt that the trial court erred in its instruction as to the legal effect which must be given to the contract. In addition, the dissent felt that the trial court erred by instructing the jury that the union could waive the employer's bargained for right to receive notice of an employee's grievance.

An appeal was also advanced by the plaintiff, William Scott. He alleged that the District Court erred in denying his post-trial motion for attorney fees. The Court of Appeals vacated the damage award against Local 377 and remanded to the District Court for a comprehensive determination as to damages which are chargeable to the union as a result of the union's breach of duty.

REASONS FOR GRANTING THE WRIT

I. IT IS BEYOND THE SCOPE OF A JURY'S AUTHORITY TO DECIDE THAT A PARTY MUST EITHER PAY CIVIL DAMAGES OR VIOLATE THE LAW.

A. Action Of An Interstate Trucking Company Which Was Taken In Order To Comply With A Regulation Of The Interstate Commerce Commission Cannot Be Deemed Wrongful By A Federal Court Jury.

The decision below should be reviewed because of its ramifications upon every company in the United States which is regulated by a governmental administrative agency. It is important for this Court to

determine for the first time whether a regulated company can be told by a federal court jury that action which the company was compelled to take in order to remain in compliance with agency regulations was "wrongful" and that as a consequence of the company's acting in compliance with agency regulations the company will be liable for damages in a civil lawsuit. The Court should also consider whether the district court is the appropriate vehicle for reviewing the company's compliance or lack of compliance with these regulations.

In 1966, the year in question in this case, the Interstate Commerce Commission, which was the agency regulating safety requirements of interstate motor carriers at that time,* had established minimum physical standards for drivers of motor vehicles in interstate commerce. The Interstate Commerce Commission regulations, 49 C.F.R. §291.2, stated that:

> No person shall drive, nor shall any motor carrier require or permit any person to drive, any motor vehicle unless such person possesses the following minimum qualifications: (a) Mental and physical condition....(2) No mental, nervous, organic, or functional disease, likely to interfere with safe driving.

*Today the United States Department of Transportation is the agency with this responsibility.

Section 291.8 provided that:

> No person shall drive nor shall any motor carrier require or permit any person to drive any motor vehicle unless such person shall have been physically examined and shall have been certified by a licensed doctor of medicine or osteopathy as meeting the requirements of §291.2.

It was undisputed throughout the proceedings below that these regulations were valid and that they were applicable to Anchor Motor Freight and to its employees, including William Scott.

Pursuant to the above regulations Scott was examined and re-examined by Dr. Lewis G. Ralston, who was the only examining physician involved in 1966. After the second examination Dr. Ralston wrote to Defendant Anchor that in his opinion Scott has severe to moderately severe diabetes and that as such he represents a hazard to himself and others when he is employed as an over-the-road truck driver. As a result, Ralston felt that Scott was not qualified to drive in interstate commerce.

The practical effect of the presence of this letter in Anchor's files was given further clarification by the testimony of G.J. Baccei, who was the District Supervisor of the Interstate Commerce Commission during the year 1966. Baccei testified at the trial that if Anchor "had a driver that didn't qualify,

they couldn't have him on the payroll and driving vehicles in interstate commerce, and that way they would be subject to prosecution if they did it." Mr. Baccei was asked if the driver referred to in Dr. Ralston's letter (i.e. William Scott) was qualified under I.C.C. regulations. He stated that "according to the doctor, he doesn't qualify." Baccei's testimony indicated that when viewed from the standpoint of the company's obligations under I.C.C. regulations, Anchor had no alternative but to discharge the plaintiff.

Anchor understood that it, just like any other firm in a regulated industry, was obliged to comply with all lawful regulations of the governing regulatory agency or subject itself to penalties for noncompliance. In the interstate trucking industry, where a firm may not even operate without first obtaining authority from the Interstate Commerce Commission, the penalties for violating I.C.C. regulations can be severe, including the revocation of the company's operating authority. This is the trucking industry's equivalent of capital punishment. In view of the possible consequences, Anchor felt that it had no choice. The company could not allow Scott to continue driving in interstate commerce and therefore discharged him.

The district court felt that there was a factual issue for the jury as to whether the discharge was for just cause, notwithstanding the fact that I.C.C. regulations absolutely prohibited Scott from driving without an examining physician's certification that he met I.C.C. physical requirements. Had Scott

obtained such certification from another doctor after Dr. Ralston refused to certify him there would have been a factual issue as to whether Scott was qualified to drive in interstate commerce. However, Scott did not obtain a report from a second examining physician. Instead, he filed suit in federal court and asked a jury to determine whether his discharge was in accordance with the company's contractual obligation to discharge only for just cause. It was the trial court's submission of this question to the jury, under strenuous objection from Defendant Anchor Motor Freight, which framed the issue herein presented for review, for by allowing the jury to decide whether the discharge was just, notwithstanding the effect of the I.C.C. regulations upon the company, the court placed Anchor Motor Freight and every other trucking company and every company in any regulated industry in an absolutely untenable position. The court gave Anchor and every similarly situated company a Hobson's choice. It could, on the one hand, willfully violate an I.C.C regulation and thereby risk I.C.C. sanctions and even possible loss of its right to continued existence in this industry. Or, on the other hand, the company could continue to comply with the I.C.C. regulations and refuse to permit a driver without medical certification to drive in interstate commerce, thereby subjecting itself to possible civil liability if the driver involved felt inclined to ask a jury in federal court to determine whether the company's compliance with federal regulations constitutes just cause for discharge.

In its opinion, the Sixth Circuit stated that "Scott introduced evidence that the company doctor had been pressured into changing his opinion as to Scott's fitness." While the record does not support this statement, even if it is assumed arguendo that the doctor was pressured, this fact would not change or invalidate the I.C.C. medical requirements. The regulations clearly require medical certification by an examining physician. At no time subsequent to Dr. Ralston's disqualification did Scott produce the required certificate. Any alleged influencing of Dr. Ralston could not change the admitted facts that Scott was diabetic, that Scott did not supply Anchor with the medical certification required by the regulations, and that Anchor was bound by those regulations.

Anchor Motor Freight submits that this question, i.e., whether compliance with federal regulations constitutes just cause for discharge, should not have been submitted to the jury, and that the effect of submitting such a question to a jury will be devastating. The agency's regulations will now be subject to a jury's evaluation, on a case by case basis, as to whether the regulation is "just." The regulated companies will no longer be able to rely on their compliance with the law as assurance that their conduct, although required by law, is not wrongful.

Cases such as the instant case have seldom reached this stage of litigation, as it appears obvious that a discharge which is required in order to remain in compliance with the law must be deemed a

discharge for just cause. This was the position of the court in a closely analogous case, Miller v. ICX, 358 F.Supp. 1378 (D.C. Ill. 1972). In Miller the plaintiff was an interstate truck driver who developed diabetes and therefore did not meet the minimum federal physical standards for drivers. The company discharged him and he filed suit, alleging that the discharge was not for just cause. The court granted the company's motion for summary judgment, holding that since the driver did not meet the government's minimum physical standards, the driver "is not qualified to perform the duties for which he was hired and could properly be discharged," and that the discharge met the contractual standard of just cause as a matter of law. This is precisely the position argued by Anchor Motor Freight in this case.

Anchor Motor Freight submits that this Court should grant its Petition For A Writ Of Certiorari in order to examine whether a jury can be allowed to force a company in a regulated industry to make a choice between violating agency regulations and incurring civil liability for breach of contract.

B. Certiorari Should Be Granted For The Court To Define The Boundaries Between The Respective Provinces Of The Regulatory Agency And The Federal Court And Jury In Cases, Such As The Instant Case, Where There Is A Conflict.

"The Supreme Court has consistently held that judicial judgment should not be substituted for administrative

judgment on questions within the agency's statutory power of rule making." Davis, Administrative Law Treatise, §30.10, citing NBC v. United States, 319 U.S. 190, 63 S.Ct. 997 (1943); American Trucking Associations v. United States, 344 U.S. 298, 73 S.Ct. 307 (1953); and American Telephone and Telegraph Co. v. United States, 299 U.S. 232, 57 S.Ct. 170 (1936).

Section 304 of Title 49, United States Code, gave the Interstate Commerce Commission the duty to regulate motor carriers and to establish reasonable requirements with respect to the qualifications of employees of carriers by motor vehicle. The regulations contained in Part 291 of Title 49 of the Code of Federal Regulations were promulgated pursuant to this authority. In Section 291.2, the I.C.C. prohibited drivers sufferin from a disease likely to interfere with safe driving from driving a motor vehicle in interstate commerce, and prohibited any motor carrier from employing such a driver. In Section 291.8, the I.C.C. required that an examining physician certify that the driver has met the requirements of Section 291.2. It is clear that the Supreme Court would not substitute judicial judgment for the judgment of the I.C.C. as to the wisdom of these regulations.

In the instant case, judicial judgment was substituted for the judgment of the I.C.C. when the jury was allowed to determine whether action taken by Anchor pursuant to the requirements of the I.C.C. regulations was just or wrongful. It is submitted that it is beyond the scope of the jury's function to evaluate the wisdom of a company's conduct when that

conduct is required in order for the company to comply with the requirements of a federal regulatory agency.

Although it is well established that the wisdom of an agency's action taken pursuant to its statutory rule making authority will not be reviewed, the instant case presents a novel variation of that proposition. The Supreme Court should grant Anchor's Petition For A Writ Of Certiorari in order to resolve the conflict between the roles of the agency and the jury in a situation where the conduct being evaluated is not the conduct of the agency but is that of a regulated company which is acting in order to comply with the agency's regulations.

C. Certiorari Should Be Granted For The Court To Define The Extent To Which A Jury Can Contradict The Intention Of The Parties In Construing The Labor Agreement.

Another facet of the conflict between the role of the jury and the administrative agency in wrongful discharge-unfair representation cases such as the instant case is created by the existence of a labor agreement governing the relationship between the parties to the suit. In the instant case the parties were under the impression that they eliminated this potential problem when they included in the contract a provision which obligated the employees to meet all requirements of local, state and federal laws, and allowed the imposition of penalties up to and

including discharge for failure to comply with these legal requirements. Certiorari should be granted so that the court can define the extent to which a jury can contradict the express intention of the parties, if at all, when the parties have agreed that there shall be no conflict between the agreement and the dictates of the law, and that employees must meet all legal requirements or face discipline and discharge.

The landmark wrongful discharge-unfair representation case is Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967). Under the doctrine of Vaca, an employee who can prove that he was not fairly represented by his union and was therefore unable to adequately pursue the contractual grievance procedures is given access to the federal courts to attempt to establish that his employer breached the labor agreement. Vaca merely provides the employee with a forum in which he may attempt to prove that his employer's conduct breached its obligations to the employee as established in the labor agreement. Vaca did not confer upon the employee any greater substantive rights than the employee had under the labor agreement.

In the instant case the contract expressly provided that drivers are obligated to meet all requirements of local, state and federal laws, and may be discharged for failure to comply with them. When the district court allowed the jury to determine whether a discharge for failure to meet a requirement of federal law was just, it not only allowed the jury to review an undisputedly valid federal regulation but it also

allowed the jury to contravene the clear intention of the parties to obligate each employee to comply with the law. Anchor Motor Freight submits that the court should reexamine Vaca and establish guidelines for the jury in its evaluation of these cases. The court should make it clear that the requirements of the labor agreement are primary and that the jury, just like the arbitrator who would have decided the case absent the union's unfair representation, is not empowered to contravene the terms embodied in the labor agreement.

II. THE ACTION OR INACTION OF AN ALLEGEDLY AGGRIEVED EMPLOYEE AND/OR HIS LABOR UNION CANNOT DEPRIVE THE EMPLOYER OF HIS BARGAINED FOR RIGHT TO RECEIVE TIMELY NOTIFICATION OF THE FILING OF THE GRIEVANCE.

This Court has often recognized the importance of effectuating the terms and conditions agreed to by the parties to a labor agreement. In United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347 (1960), the Court stated that "[a] collective bargaining agreement is an effort to erect a system of industrial self-government," and that "[t]he processing of disputes through the grievance machinery is actually the vehicle by which meaning and content are given to the collective bargaining agreement." In Republic Steel v. Maddox, 379 U.S. 650, 85 S.Ct. 614 (1965), the Court recognized that employer interests are also deserving of protection, and that it is legitimate to limit the choice of remedies available to

an employee to those contained in the labor agreement. The court held that "federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress." 379 U.S. at 652.

In the instant case the parties have bargained for and established an elaborate grievance procedure which occupies approximately seven pages of the labor agreement (Article 7). Section 2 of that Article states that if a dispute is not settled after informal discussions, grievances "shall be put in writing and presented to the company" within a specified time period. Presentation of the written grievance to the company within the time limit is expressly required. If the dispute is not settled or deadlocked within a specified period of time the contract provides for its submission to a contractually established arbitration panel.

Article 32 of the contract deals specifically with discharge or suspension, and provides for appeals from such action. That Article states that appeal from a discharge "must be taken within ten days by a written notice," and if no decision is reached within thirty days the appeal provisions of Article 7 shall apply.

The majority of the Court of Appeals held that notwithstanding the fact that Scott never made any effort to supply Anchor with written notice of his

grievance, Scott met his duty of attempting to use the grievance procedure by attempting to notify the union of his grievance. The effect of this decision is entirely contrary to the traditional posture of the parties to a labor agreement. The Sixth Circuit's holding allows the adversary of the employer, the union, by its action or inaction, to waive notice to the employer, thereby waiving an important right of the employer. In so ruling the Court of Appeals has deprived the employer of his due process right to notice of the pendency of a claim against him. The grievance is against the employer, not against the union; the union represents the employee involved. To hold that the union's receipt of the notice is sufficient to constitute notice to the employer, or that the union by its action or inaction can waive an important right belonging to its adversary, is contrary to all principles of an adversary system. Such a holding effectively destroys the provisions, which are contained in most collective bargaining agreements, which establish mandatory time limits for the filing of a grievance.

The importance of these time limit-notice requirements cannot be over-emphasized. Until an employer receives notification of the filing of a grievance he has no way to determine that the employee involved feels aggrieved. And, at the conclusion of the notice period, if no grievance has been filed the employer is entitled to treat the matter as duly concluded. Conversely, if the employer has been notified of the filing of a grievance he can consider taking action to protect his interests. Since he will now

be aware that a claim is being made against him and that he is accruing potential liability as a result of it, the employer may decide to reevaluate his position and even settle the dispute. At very least he will know that the dispute will be settled in accordance with the procedures set forth in the labor agreement in a just and expeditious fashion.

The instant case is in contrast to the above. Because neither the union nor the employee involved notified Anchor that a grievance has been filed, Anchor was not aware that Scott felt aggrieved. No settlement efforts were made. The matter was considered closed until many months after the discharge. During this period of time Anchor was accruing potential liability without being afforded an opportunity to resolve the dispute, mitigate its damages, or even employ the grievance machinery for which it had bargained. All of this was to Anchor's detriment, and all of it was the result of the failure of Scott and/or the union to notify the company of the pendency of the grievance.

The Sixth Circuit relied on Vaca v. Sipes, supra, for the proposition that an employee must at least attempt to exhaust the contractual grievance procedures before he may bring a suit such as the instant case. In Vaca, the employee had done all he could to pursue his grievance. Any further action was solely within the control of the union. Vaca merely gave the employee a federal court forum when he had done everything he could to pursue his grievance but was prevented from

going further by the union. In the instant case, the plaintiff did not even notify his employer of his grievance. Nothing prevented Scott or the union from sending a copy of the grievance to Anchor. Nevertheless, it was not sent to Anchor. As a result, the company was deprived of an opportunity to attempt to resolve the dispute in accordance with the contract it had negotiated, and it was deprived of an arbitral forum as a result of action or inaction by its adversaries in the dispute.

Even if it is assumed, arguendo, that the grievance had been timely sent by Scott to the union and that the union failed to send it to Anchor, which has not been admitted, Anchor submits that its rights under the contract cannot be made subject to the union's conduct, where an obligation of an individual under the collective bargaining agreement can be performed either by the individual or his union. Where this obligation is not met, to the employer's detriment, the employee should not be allowed to use his right to fair representation as a sword to inflict losses upon an innocent employer. Admittedly, where the union has sole and exclusive control over access to the grievance machinery and where unfair representation is proven, an employee is entitled to some protection. However, where, as here, nothing prevents the employee himself from meeting his obligation of notice to the employer and where the employer was subjected to damage by the failure to receive notice, the employee should be required to bear the responsibility for his own inaction. Since the employee is at least equally responsible

for the failure to meet the requirements of the grievance procedure he must bear the burden attendant to that failure. As a matter of law, the suit should have been dismissed for failure to adequately attempt to exhaust the contractual grievance procedures. At very least, damages against the employer for loss of earnings cannot be allowed to extend beyond the time the dispute would have been resolved under the contractual procedures had they been properly employed, whether the failure to so employ them was caused by the employee or by his union, where the union does not have sole control over access to the grievance procedures.

III. THE OPINION OF THE COURT OF APPEALS SHOULD BE REVIEWED BECAUSE IT AMELIORATED THE DISTINCTION BETWEEN A MOTION FOR LEAVE TO AMEND AND THE MERITS OF THE ALLEGATIONS CONTAINED IN THE AMENDMENT TO THE PLEADING.

Prior to trial Scott moved the court for leave to amend the prayer for relief contained in his complaint in order to add the following language:

> Plaintiff further prays that after trial of this action, the court award plaintiff reasonable attorney fees.

The motion for leave to amend was not opposed by the defendants and was granted by the court. The court did not discuss or rule upon the sufficiency of the amendment. Rather, it merely granted

the plaintiff leave to amend his prayer for relief.

Subsequent to trial Scott moved for an award of attorney fees. The court denied his motion, holding that the jury must have included attorney fees in the damages charged against the union, as the district court had instructed the jury that the damages chargeable to the union include the expense of collecting from the employer. The Sixth Circuit held that the verdict against the union was speculative and cannot stand, since no evidence of attorney fees, which was the major element of the expense of collection, was submitted to the jury. The Court of Appeals remanded to the district court for a comprehensive determination of the damages chargeable against the union, holding that the absence of evidence of attorney fees was "through no fault of Scott's."

Rule 15(a), Fed.R.Civ.P., clearly states the liberal policy of the federal courts toward the amendment of pleadings when it provides that leave to amend "shall be freely given when justice so requires." This Court has often reiterated and reinforced this philosophy. See Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962); U.S. v. Hougham, 364 U.S. 310, S.Ct. 13 (1960); and Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957).

It is also well established that "a court will not, ordinarily, pass upon the sufficiency of an amendment to a complaint upon a motion for leave to file." Fox v. City of West Palm Beach, 383 F.2d 189, 195 (5th Cir. 1967).

See also Peterson Steels v. Seidmon, 188 F.2d 193 (7th Cir. 1951). It has even been held that it is improper for a district court to rule on the sufficiency of a claim when it is merely disposing of a motion for leave to amend. Fischer & Porter Company v. Haskett, 287 F.Supp. 831 (D.C. Pa. 1968).

In the instant case the district court's ruling on Scott's motion to amend merely allowed Scott to add one more request to his prayer for relief. The court did not, either expressly or by any reasonable implication, rule on the sufficiency of the amendment. Nevertheless, the Court of Appeals elevated the district court's favorable response to Scott's motion for leave to the level of a ruling on the merits of his amendment. This is a serious error. Not only does it misconstrue a simple request for a leave to amend, but it also constitutes a significant departure from the clear policy of Rule 15. If this ruling is allowed to stand the district courts in the Sixth Circuit will now be compelled to examine the sufficiency of proposed amendments to pleadings before they grant leave to amend. This is the antithesis of freely granting leave to amend. In order to avoid the imposition of this constraint upon the workings of Rule 15(a), this Court should grant Anchor's Petition For A Writ Of Certiorari.

IV. THE COURT MAY NOT REMAND ONLY ONE ISSUE OF A CASE FOR "A COMPREHENSIVE DETERMINATION" WHEN THE OTHER ISSUES OF THE CASE ARE CLOSELY RELATED TO THE ISSUE REMANDED.

The Court of Appeals has vacated the award of damages against Local 377 and remanded the case to the district court for a "comprehensive determination of damages incurred by Scott as a result of the Union's breach of duty of fair representation, under the principles of Vaca v. Sipes."

In Vaca, this court set forth the manner in which damages are to be computed, holding that:

> The governing principle, then, is to apportion liability between the employer and the union according to the damages caused by the fault of each. Thus, damages attributable soley to the employer's breach of of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer. 386 U.S. at 198.

In Czosek v. O'Mara, 397 U.S. 25, 90 S.Ct. 770 (1970), the Court held that "damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer."

In this type of case, the computation of damages according to the Vaca and Czosek

criteria is inextricably tied to the question of liability. In order for the plaintiff to establish liability he must prove both elements of the case, i.e., that he was wrongfully discharged by his employer and that his union breached its duty to fairly represent him. On one hand, if the discharge by the employer was not wrongful there would be no breach of contract and therefore no basis of recovery against the employer. In addition, if there was no wrongful discharge the union's conduct in handling a meritless grievance would be of no legal significance. Patrick v. International Union of Operating Engineers, 456 F.2d 672 (8th Cir. 1972). On the other hand, even if the employer did discharge Scott wrongfully, unless Scott can establish that the union breached its duty of fair representation he would be unable to prevail, as he would be bound by his failure to exhaust his contractual remedies, i.e., to use the grievance procedure.

The proof of the elements of liability, especially as to the union, involve the very same questions that a jury must consider in determining the extent of the plaintiff's damages. To prove unfair representation the plaintiff must prove that the union's conduct toward him and the processing of his grievance was "arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, supra. In the instant case Scott attempted to create an inference of this arbitrary, discriminatory or bad faith conduct of the union from the reaction of the union officials to him and to his grievance.

These are precisely the same elements which the jury must examine in order to determine the "damages caused by the union's refusal to process the grievance" (Vaca v. Sipes) and the way in which the union's conduct "added to the difficulty and expense of collecting from the employer." (Czosek v. O'Mara). These elements are crucial to both the union's liability and to the damages attendant thereto. In addition, the union's liability and that of the employer are equally intertwined, as neither defendant is liable unless the other has also breached its duty.

In Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 51 S.Ct. 513 (1931), the Supreme Court held that:

> Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice....Here the question of damages on a counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial.

This position has been consistently reiterated through the present time.

See United Air Lines, Inc. v. Wiener, 286 F.2d 302 (9th Cir. 1961); Williams v. Slade 431 F.2d 605 (5th Cir. 1970); and Vidrine v. Kansas City Southern Railway Co., 466 F.2d 1217 (5th Cir. 1972).

It is submitted that the issues of liability and damages in this type of case are so interwoven that it would be impossible for a jury to fairly determine one without determining the other. It is further submitted that the same kind of interrelationship exists between the alleged liability of the separate parties, as one defendant cannot be liable unless his codefendant is also liable. For these reasons the Court should grant the instant petition and review the decision of the Court of Appeals which severed issues which are inherently not severable, and which erroneously remanded only one part of the case for a new trial.

V. CONCLUSION

For the reasons set forth herein, this Petition For A Writ Of Certiorari should be granted.

Respectfully Submitted,

BERNARD S. GOLDFARB
Attorney for Petitioner
Anchor Motor Freight, Inc.

Cleveland, Ohio
July 24, 1974

OF COUNSEL:
GOLDFARB & REZNICK
1825 The Illuminating
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of July, 1974, three copies of the foregoing Petition For A Writ Of Certiorari were sent by certified mail, return receipt requested, to the following attorneys for each other party separately represented, pursuant to Supreme Court Rule 33(1): Paul H. Tobias, Esquire, Attorney for William Scott, 911 First National Bank Building, Cincinnati, Ohio 45202; Eugene Green, Esquire, Attorney

for Local Union No. 377, 602 Stambaugh Building, Youngstown, Ohio 44503.

Bernard S. Goldfarb

Nos. 73-1703, -1704, & -1705

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 73-1703

WILLIAM SCOTT,
Plaintiff-Appellee,

v.

ANCHOR MOTOR FREIGHT, INC.,
Defendant-Appellant.

No. 73-1704

WILLIAM SCOTT,
Plaintiff-Appellant,

v.

ANCHOR MOTOR FREIGHT, INC., ET AL.,
Defendants-Appellees.

No. 73-1705

WILLIAM SCOTT,
Plaintiff-Appellee,

v.

TEAMSTERS LOCAL UNION 377,
Defendant-Appellant.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed April 30, 1974.

Before: CELEBREZZE, PECK and MCCREE, Circuit Judges.

APPENDIX A

CELEBREZZE, J., delivered the opinion of the Court, in which PECK, J., joined. MCCREE, J., (pp. 12-14) filed a dissenting opinion.

CELEBREZZE, Circuit Judge. Consolidated herein are three appeals from a judgment against a company and a union. Plaintiff William Scott (Scott) sued his former employer and union representative under section 301 of the Labor Management Relations Act,[1] claiming that Defendant Anchor Motor Freight (Anchor) had wrongfully discharged him and that Defendant Teamsters Local 377 (Local 377) had unfairly represented him in protesting the discharge.

Through special verdicts, the jury found that Scott had been wrongfully discharged and assessed damages against Anchor of $12,500. It also awarded Scott $12,500 from Local 377, which it found had failed to represent him properly.

Local 377 appeals the final judgment, as well as the District Court's denials of motions for judgment notwithstanding the verdict and for vacation of the judgment. Anchor appeals on identical grounds, as well as appealing a denial of a motion for a new trial. Plaintiff Scott also appeals, claiming that the District Court's denial of a post-trial motion for an award of attorney fees was erroneous.

Scott began driving trucks for Anchor in 1953. In 1964 Anchor shut down its Norwood, Ohio terminal, where Scott had been working. A new terminal was opened in Lordstown, Ohio in 1966, and Anchor offered Scott a job after a physical examination by a company doctor, who certified Scott under ICC rules though noting that he was a diabetic. Over two months later, Scott was discharged, on July 23, 1966. Anchor claims the discharge resulted from Scott's physical problems while on the job in 1966 and a second letter from its doctor, stating that Scott was unfit to drive a truck. It argues that Scott was unfit under ICC rules, so that it was merely obeying the ICC when it discharged Scott. Scott

[1] 29 U.S.C. § 185.

claims he was fired because of his initiation of legitimate complaints against the Company. Scott introduced evidence that the company doctor had been pressured into changing his opinion as to Scott's fitness, that Anchor officials acted out of personal hostility in discharging him, and that he suffered no blackouts or other uncontrollable problems from his diabetes, which was being treated by mild medication.

Soon after his discharge Scott sent two letters to Teamsters Local 377, complaining of pay shortages for completed work and of an unfair discharge. He did not file a standard grievance form, according to Local 377, nor did he appeal his discharge in writing to the Company within ten days of his discharge. Local 377 did not press Anchor about the discharge, and Scott introduced evidence that the Union handled his protest perfunctorily and in bad faith. In December 1966 or January 1967, Scott attempted to have Local 377's steward and committeeman process a grievance concerning this discharge. There was evidence that because of the newness of the Lordstown operation, Local 377 did not have the requisite machinery to process a grievance within ten days of Scott's discharge, a time limit imposed by the labor contract for appealing discharges thought to be unfair.

Receiving no relief from the Company and no significant help from the Union, Scott filed a complaint in District Court in April 1968, alleging an improper discharge and unfair representation by Local 377. The jury verdict followed.

The first issue we face is whether Defendants were entitled to judgment notwithstanding the verdict on the ground that Scott failed to invoke the grievance procedures set forth in the Local 377 – Anchor contract. If Scott's efforts to invoke the contract grievance procedures were insufficient as a matter of law, he is barred from suing his employer and union. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653 (1965); *Durham* v. *Mason and Dixon Lines, Inc.*, 404 F.2d 864, 865 (6th Cir. 1968).

The District Court let the jury determine whether Scott

had complied with the terms of the collective bargaining agreement. It instructed the jury:

> "The second question you will be asked to answer either yes or no, which, in either instance, has to be the unanimous opinion of you all, is:
>
> 'Has the plaintiff properly filed or caused to be filed in his behalf a notice of appeal from discharge in writing within the time limitation, if any, set forth in the contract?'
>
> In conjunction with that, you will be required to answer Question 2-A, which reads:
>
> 'If the answer to Question No. 2 is in the negative, has the plaintiff been excused from compliance with any required notice by the conduct of the union?'
>
> The plaintiff must comply with all conditions precedent or requirements on his part of things to be performed by him under the contract before he can recover.
>
> The contract provides in part: 'Appeal from discharge, suspension or warning notice must be taken within ten days by a written notice.'
>
> The defendants contend that the contract provides that a copy of an appeal must be filed by the plaintiff with the company and the plaintiff has failed to comply with certain provisions of the contract.
>
> The plaintiff states that the contract does not require that plaintiff file a copy of an appeal with the company and that the contract requires a filing with the union, and further, if the contract does require a filing with the company, that the plaintiff is excused from filing said appeal or grievance with the company as a result of the conduct of the union.
>
> I state to you that it is for you to determine whether or not the contract requires that a copy of an appeal or grievance should be filed by the plaintiff with the company and, if you determine that the contract does require the filing by the plaintiff with the company, whether or not the plaintiff's compliance with that provision is ex-

cused or waived by reason of the alleged conduct of the union.

I state to you that if the conduct of the union wilfully prevented compliance with the contract requirement that a copy of the appeal be filed with the company, such requirement can be waived.

Likewise, the defendants contend that the contract requires that any notice of appeal or protest or grievance shall be filed within ten days of the date of discharge and the plaintiff has failed to comply with said provision of the contract and, therefore, cannot recover.

It is for your determination as to the meaning of the contract and the time when the ten-day limitation starts to run and for you to determine the plaintiff's compliance or non-compliance within the meaning of the provision of the contract, as you determine the meaning of said provision."

It is clear from *Vaca* v. *Sipes*, 386 U.S. 171 (1967), that an "employee must at least attempt to exhaust grievance and arbitration procedures established by the [collective] bargaining agreement," 386 U.S. at 184, before a court may entertain a claim of unfair representation against a union and wrongful discharge against an employer. "[U]nless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf." *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653 ('965). Whether a plaintiff has done this is a question of federal law, subject to proof at trial. The evidence in this case sufficed to support a finding that Scott made a good-faith effort to invoke the contract's grievance procedure.

On August 2, 1966, Scott sent a letter to Local 377, which stated that "I feel that I am a safe driver and should be reinstated with back pay" and requested a meeting and hearing as soon as a steward and representative committee for the Lordstown plant could be elected, none having been set up since the Lordstown operation's opening. Assuming that

this letter was timely sent and properly addressed, it was a sufficient attempt to invoke the collective bargaining agreement's grievance procedure, under *Republic Steel Corp.* v. *Maddox* and *Vaca* v. *Sipes*, to give the District Court jurisdiction over the case. *Contrast Steen* v. *Local 163*, 373 F.2d 519 (6th Cir. 1967), where "plaintiff had made no effort whatsoever to comply with the grievance procedure," 373 F.2d at 520; and *Broniman* v. *Great Atlantic & Pacific Tea Co.*, 353 F.2d 559 (6th Cir. 1965), where "there was no real attempt to use the grievance procedure," 353 F.2d at 563.

Given this conclusion, whether Scott actually wrote this letter and whether he complied with the terms of the contract in delivering it are questions of fact, subject to a jury's determination.

When a contract is ambiguous, it is for the jury to determine the meaning of its terms, subject to proper instructions and based upon "evidence of the surrounding circumstances and the practical construction of the parties." *Tennessee Consolidated Coal Co.* v. *United Mine Workers of America*, 416 F.2d 1192, 1198 (6th Cir. 1969);[2] *Goddard* v. *Foster*, 17 Wall. 123, 142 (U.S. 1872); *Local 783* v. *General Electric Co.*, 471 F.2d 751, 757 (6th Cir. 1973). Article 32 stated that appeals from discharge "must be taken within ten days by a written notice." The contract is ambiguous as to when the ten-day limit begins to run and whether notice must be sent by the discharged employee to the employer (rather than solely to the union). The District Court properly allowed the jury to resolve these ambiguities, and the jury resolved them in favor of Scott.[3]

---

[2] When a contract is unambiguous, the judge must state its proper construction to the jury rather than allow it to adopt an erroneous view of the contract. See 4 S. Williston, Law of Contracts 303 (3d ed. 1961). "Where, however, the meaning of a writing is uncertain or ambiguous, the question of its meaning should be left to the jury." 4 Williston, 652. *Cf.* 3 A. Corbin, Contracts 226-27 (1960).

[3] Article 32 provides that "Discharge must be by proper written notice to the employee and the union affected," so that the date of discharge could be construed to be the date on which the employee

Thus, the District Court's instruction to the jury on Questions 2 and 2-A is not reversible error, though it might have been more clearly stated and have better explained the legal principles that bound the jury's quest for truth. Likewise, the jury's conclusion is not reversible.

The second issue before us is whether Defendant Anchor was entitled to judgment notwithstanding the verdict or a new trial on the ground that, as a matter of law, Scott's discharge cannot be deemed wrongful.

Anchor sought instructions from the District Court that would essentially have stated that if the jury found that the Company's doctor in good faith refused to certify Scott as a fit driver under ICC rules, then it should find for Defendant Anchor. The District Court refused to give such a charge. Instead, it stated the following:

> "The first question you will have to answer is:
>
> 'Do you find that the plaintiff has established by a preponderance of the evidence that Anchor Motor breached its contract with Local Union 377 by discharging Mr. William Scott in July, 1966'?
>
> Under the contract, which you will have with you in the jury room, the company had full power to discharge. It was agreed that this power to discharge shall be exercised with justice with respect to the reasonable rights of both the employee and the employer. The contract also requires that judgment be exercised with just cause.
>
> You should take into account the reasonable rights of both the plaintiff and the company and all the facts you find to be pertinent to a determination of whether this discharge was with justice and for just cause.

---

and the union had both received notice of the discharge. Here that date was July 26. Since Local 377 received word of Scott's request for help no later than August 4, Local 377 would have had time to press his claim within the ten-day limitation, under this reading of the contract.

You may also take into consideration what, if anything, the company records show as to the nature of the plaintiff's physical condition and the duties required of the plaintiff.

You may take into consideration the company's performance relative to other employees with disabilities.

You may also take into consideration whether or not a warning was served upon the plaintiff and the effect of the service or lack of service on the plaintiff and the effect of the same on the respective rights of the parties.

I have used the term 'justice.' Justice means to act with equity, in fairness.

I have used the term 'just cause.' Just cause means a cause based upon reasonable ground and a fair and honest cause or reason regulated by good faith on the part of the party exercising the power to terminate."

This charge allowed the jury to determine the meaning of "just cause" under the contract. The meaning of this phrase was hotly disputed by the parties. Anchor argued that a good-faith refusal of its doctor to certify a driver should amount to just cause, as a matter of law, even if the jury were to conclude that the doctor had made a mistake and that Scott qualified under ICC rules. Scott argued the opposite, claiming that it is unjust to discharge an employee when the asserted reason is based on an error of a company's agent.

Under *Tennessee Conoslidated Coal Co.* v. *United Mine Workers of America*, 416 F.2d 1192, 1198 (6th Cir. 1969), ambiguous terms of a contract are to be construed by the jury, not by the judge. This rule makes sense particularly in the present context. "Just cause" was deliberately inserted into the collective bargaining agreement to give an arbitrator, the final forum envisioned under the contract, significant flexibility in adjusting the rights of employer and employee. When the arbitrator's function is assumed by a court, because the grievance machinery has not functioned and an aggrieved employee

asserts his right to a court test of his claim under *Vaca* v. *Sipes*, the job of interpreting "just cause" should be given to the jury. Based on evidence of company practice, treatment of similar employees, and other relevant factors, the jury should be free to exercise its judgment in determining whether the plaintiff employee's discharge was "for just cause." We consider the District Court's description of that phrase proper and find no error in its charge to the jury on Question 1.

Finding the District Court's instructions on apportionment of damages proper,[4] the jury's determination of the amount assessed against Anchor not unreasonable, and no other contentions of Defendants-Appellants meritorious, we turn to Plaintiff Scott's appeal. Scott argues that the District Court abused its discretion in denying his post-trial motion for attorney fees.

In April 1972, the District Court allowed Scott to amend his complaint by approving the following request:

> "Plaintiff further prays that after the trial of this action, the court award plaintiff reasonable attorney fees."

Scott claims that in reliance on the Court's action he did not present evidence at the August 1972 trial concerning attorney fees. After trial the District Court overruled a motion for attorney fees, stating that the jury verdict of $12,500 against Local 377 "must necessarily represent the jury's finding as to the extent that said defendant's conduct in refusing to handle plaintiff's grievance added to the difficulty and expense of collecting from defendant Anchor Motor Freight." The Court stated that the $12,500 verdict against Anchor necessarily represented the full extent of damages caused by its breach of contract (i.e., lost wages).

We agree with the District Court that an award of attorney fees against the employer in this case would be unjust, since

[4] The District Court's instructions on the amount of damages attributable to the union's unfair representation were taken directly from *Vaca* v. *Sipes*, *supra*, and *Czosek* v. *O'Mara*, 397 U.S. 25 (1970).

the only damages for which an employer may be held are those directly caused by the wrongful discharge – that is, lost wages and related items. *Vaca* v. *Sipes*, 386 U.S. at 197-198; *Czosek* v. *O'Mara*, 397 U.S. 25 (1970).

As to Defendant Local 377, however, the District Court's conclusion must be reversed. The Court itself granted Plaintiff Scott's motion to amend his complaint, thereby advising Scott that it would consider a motion for attorney fees *after* trial. By overruling Scott's motion for an award of attorney fees (claimed to be in excess of $12,500) after trial on the ground that the jury must have included attorney fees in its estimation of damages, the Court foreclosed Scott from proving the amount of litigation costs incurred because of the Union's breach of its duty of fair representation. Yet, the District Court charged the jury to award damages against the Union in an amount representing "the extent [to which Local 377's] refusal to handle the grievance added to the difficulty and expense of collecting from the employer." A reasonable juror would have assumed that this amount should include attorney fees.

The difficulty is that the jurors were presented with no evidence of what attorney fees were in this case, though their charge comprehended determining an amount of attorney fees. Thus, through no fault of Scott's, there was a complete absence of evidence concerning attorney fees, though they represented a major element of the damage incurred by Scott as a result of the breach of the Union's duty of fair representation. The $12,500 verdict against the Union necessarily rests on a sheerly speculative foundation and cannot stand. *See Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946).

Because the error did not lie with Scott, we must afford him an opportunity to prove a proper amount of damages against the Union. We therefore vacate the award against Local 377 and remand to the District Court for a comprehensive determination of damages incurred by Scott as a result of the

Union's breach of its duty of fair representation, under the principles of *Vaca* v. *Sipes*, 386 U.S. at 196-98.

The judgments against Appellants Anchor Motor Freight and Local 377 in cases No. 73-1703 and 73-1705 are affirmed, with order that the damage award against Local 377 be vacated. Costs of these appeals are to be taxed equally between Anchor Motor Freight and Local 377. The order in case No. 73-1704 is reversed, and the cause is remanded to the District Court with instruction that the amount of damages properly attributable to the breach of Local 377's duty of fair representation be assessed. Costs of this appeal are to be taxed to Local 377.

McCREE, Circuit Judge (Dissenting). I respectfully dissent. The unambiguous terms of the collective bargaining agreement that governed appellee's employment required him to give notice of his grievance to his employer within ten days of discharge, and failure to comply with this requirement defeats the action in this case. Article 32 of the agreement provides: "Appeal from discharge . . . must be taken within ten (10) days by written notice. . . . If the employee involved is not within the home terminal area when the action of discharge . . . is taken, the ten (10) day period will start from the date of his return to the home terminal." Article 7 of the agreement, concerning grievance procedures, provides, in relevant part, "Disputes and grievances shall be *put in writing and presented to the company* within one (1) week whenever possible, but in no case later than thirty (30) days after the *grievance arises.*" (emphasis added).

If these two provisions are considered together, it is apparent that wrongful discharge is a particular type of grievance about which the employee must complain within ten days, a shorter period of time than that allowed for presenting other grievances that may be less costly for the employer to remedy if the complaint proves to be meritorious. Yet, as Article 7 makes clear, all grievances must be put in writing and presented to the employer within a specified period of time after they arise. In the case of a discharge, the grievance arises at the moment the employee is discharged, not at the time written notice of discharge is received by both the employee and his union. Moreover, Article 32 refers to discharge and not to receipt of notice of discharge as the event that starts the ten day appeal period running. This interpretation is also supported by the special provision for an employee who is away from home at the time he is discharged. Although he and his union may receive notice of discharge and the employee may be actually discharged while he is on the road, the ten day appeal period does not begin to run until

he is home and presumably able to press his appeal conveniently.

This interpretation of the contract, I believe, is the only one that can be made considering the instrument as a whole, and it follows that the running of appellee's ten day appeal period commenced on July 23, the date of his discharge. It was not until the tenth day thereafter, on August 2, that appellee sent written notice of his grievance to his union. The union received this letter two days later. Appellee never notified his employer of his grievance within either the ten day period of time provided by the contract or within any reasonable period of time thereafter. Because of his failure to notify his employer of his grievance within the ten day period or even to request his union to act on his behalf at a time when it was still possible for the union to do so, he is precluded from recovering against either his employer or his union. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965), *Durham* v. *Mason and Dixon Lines, Inc.*, 404 F.2d 864 (6th Cir. 1968).

I believe that ambiguity can be found in the agreement only by a strained reading. However, even if the instrument were ambiguous and a jury might be permitted to determine the meaning intended by the parties to be placed upon unclear terms, reversal would still be required because the district court failed to give correct and sufficiently specific instructions to the jury about the legal rights and duties created by the instrument it was asked to construe. Although I agree that the meaning of ambiguous contractual provisions may present a question of fact to be resolved by a jury in appropriate cases, a jury, after factual ambiguity has been resolved, does not have the power to determine the legal effect to be accorded the provisions of the contract. It is a matter of elementary contract law that "[t]he determination of the legal operation of a contract, after the meaning of its language has been adopted by process of interpretation, is always for the court, because 'legal operation' is the result of applying rules of law to the

facts. . . . [C]onstruction is always a matter of law for the court." 3 A. Corbin, Contracts §§ 534, 554 (1960).

Nor do I believe that under the circumstances of this case, the union could waive the employer's contractual right to receive notice of an employee grievance. The employer bargained for this right, and although it might waive it, the union, the opposite contracting party, could not. The district court erred when it instructed the jury that the union could waive notice for the employer, and the majority opinion, by not discussing the issue, approves this error by silence. Certainly the Supreme Court's decision in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), does not authorize this instruction. The only question in that case was whether an employee who charged his union with breaching its duty of fair representation, a matter cognizable by the NLRB as an unfair labor practice, was precluded by the preemption doctrine from pursuing directly his grievance in a judicial forum. Nothing the Supreme Court said in that opinion supports the waiver instruction given by the district court because the conduct of the union in this case did not preclude or prevent appellee from giving notice of his grievance to his employer. It may be appropriate to hold that an employer may not assert improper union conduct as a shield against an action brought by an employee when "the union has sole power under the contract to invoke the higher stages of the grievance procedure, *and* if . . . the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance." *Vaca* v. *Sipes*, *supra*, at 185. This is not such a case.

I agree with the court's determination that the damage award cannot stand. Nevertheless, I would reverse because I believe that the bargaining agreement can be interpreted in only one way and that appellee failed to comply with its requirements for presenting his grievance. At a minimum, appellants are entitled to a new trial because the district court failed to give proper instructions to the jury on the issue of liability.

United States District Court

FOR THE

Northern District of Ohio, Eastern Division

FILED
Aug 18 2 23 PM '72

CIVIL ACTION FILE NO. C 68-252-Y

William Scott

vs.

JUDGMENT

Anchor Motor Freight, Inc.
and Local Union #377, International
Brotherhood of Teamsters, etc.

This action came on for trial before the Court and a jury, Honorable Leroy J. Contie, Jr., United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged that the plaintiff recover from the defendant, Anchor Motor Freight, Inc., the sum of Twelve Thousand Five Hundred and 00/100 Dollars($12,500.00) and further that the plaintiff recover from the defendant, Local Union #377, the sum of Twelve Thousand Five Hundred and 00/100 Dollars ($12,500.00). Costs of this case are assessed equally against each defendant.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Dominic J. Cavalo, Clerk
U. S. District Court
Northern District of Ohio
By: Deputy Clerk

Dated at Cleveland, Ohio, this 18th day of August, 19 72.

Leroy J. Contie, Jr.
U. S. District Judge

APPENDIX B

§ 185. Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

APPENDIX C.

§ 304. Powers and duties of Commission—Powers and duties generally

(a) It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of subsection (c) of this section and sections 305, 320, 321, 322(a), (b), (d), (f), and (g), and 324 of this title.

(3a) Notwithstanding any other provision of section 303(b) of this title, to establish for carriers of migrant workers by motor vehicle reasonable requirements with respect to comfort of passengers, qualifications and maximum hours of service of operators, and safety of operation and equipment. Such requirements shall apply to any such carrier only in the case of transportation of any migrant worker

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for a total distance of more than seventy-five miles, and then only if such transportation is across the boundary line of any State, the District of Columbia, or Territory of the United States, or a foreign country. When such requirements are established, the term "motor carrier" shall be construed to include carriers of migrant workers by motor vehicle in the administration of subsection (c) of this section and sections 305, 320, 321, 322(a), (b), (d), (f) and (g), and 324 of this title.

(4) To regulate brokers as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to licensing, financial responsibility, accounts, records, reports, operations, and practices of any such person or persons.

(4a) To determine, upon its own motion, or upon application by a motor carrier, a State board, or any other party in interest, whether the transportation in interstate or foreign commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation solely within a single State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in this Act. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this chapter, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in interstate or foreign commerce performed by the carrier or class of carriers designated in such certificate shall be, or shall have become, or is reasonably likely to become, of such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Commission of interstate or foreign transportation by motor carriers in effectuating the national transportation policy declared in this Act. Upon revocation of any such certificate, the Commission shall restore to the carrier or carriers affected thereby, without further proceedings, the authority, if any, to operate in interstate or foreign commerce held by such carrier or carriers at the time the certificate of exemption pertaining to such carrier or carriers became effective. No certificate of exemption shall be denied, and no order of revocation shall be issued, under this subparagraph, except after reasonable opportunity for hearing to interested parties. Where an application is made in good faith for the exemption of a motor carrier under this subparagraph, accompanied

by a certificate of a State board of the State in which the operations of such carrier are carried on stating that in the opinion of such board such carrier is entitled to a certificate of exemption under this subparagraph, such carrier shall be exempt from the provisions of this chapter beginning with the sixtieth day following the making of such application to the Commission unless prior to such time the Commission shall have by order denied such application, and such exemption shall be effective until such time as the Commission, after such sixtieth day, may by order deny such application or may by order revoke all or any part thereof as hereinbefore authorized. In any case where a motor carrier has become exempt from the provisions of this chapter as provided in this subparagraph, it shall not be considered to be a burden on interstate or foreign commerce for a State to regulate such carrier with respect to the operations covered by such exemption. Applications under this subparagraph shall be made in writing to the Commission, verified under oath, and shall be in such form and contain such information as the Commission shall by regulations require.

(5) For the purpose of carrying out the provisions pertaining to safety, the Commission may avail itself of the assistance of any of the several research agencies of the Federal Government having special knowledge of any such matter, to conduct such scientific and technical researches, investigations, and tests as may be necessary to promote the safety of operation and equipment of motor vehicles as provided in this chapter; the Commission may transfer to such agency or agencies such funds as may be necessary and available to make this provision effective.

(6) To administer, execute, and enforce all provisions of this chapter, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

(7) For purposes of the administration of the provisions of this chapter, to inquire into the management of the business of motor carriers and brokers, and into the management of the business of persons controlling, controlled by, or under common control with, motor carriers to the extent that the business of such persons is related to the management of the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted, and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time, such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary.

Classification of motor carriers

(b) The Commission may from time to time establish such just and reasonable classifications of brokers or of groups of carriers included in the term "common carrier by motor vehicle", or "contract carrier by motor vehicle", as the special nature of the services performed by such carriers or brokers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this chapter, to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest.

Investigation of complaints; orders

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

Application of sections 14 and 16(13) of this title

(d) The provisions of sections 14 and 16(13) of this title, relating to reports, decisions, schedules, contracts, and other public records, shall apply in the administration of this chapter.

Regulations governing use of vehicles owned by others

(e) Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the

motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

Exceptions to regulations for use of vehicles owned by others

(f) Nothing in this chapter shall be construed to authorize the Commission to regulate the duration of any such lease, contract, or other arrangement for the use of any motor vehicle, with driver, or the amount of compensation to be paid for such use—

(1) where the motor vehicle so to be used is that of a farmer or of a cooperative association or a federation of cooperative associations, as specified in section 303(b) (4a) or (5) of this title, or is that of a private carrier of property by motor vehicle as defined in section 303(a) (17) of this title and is used regularly in the transportation of property of a character embraced within section 303(b) (6) of this title or perishable products manufactured from perishable property of a character embraced within section 303(b) (6) of this title, and such motor vehicle is to be used by the motor carrier in a single movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; or

(2) where the motor vehicle so to be used is one which has completed a movement covered by section 303(b) (6) of this title and such motor vehicle is next to be used by the motor carrier in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based.

Feb. 4, 1887, c. 104, Pt. II, § 204, as added Aug. 9, 1935, c. 498, 49 Stat. 546, and amended June 29, 1938, c. 811, § 4, 52 Stat. 1237; Sept. 18, 1940, c. 722, Title I, §§ 19, 20(a, b), 54 Stat. 921, 922; Mar. 27, 1942, 3 p.m., E.W.T., c. 199, Title I, § 101, 56 Stat. 176; Aug. 3, 1956, c. 905, § 2, 70 Stat. 958; Aug. 3, 1956, c. 928, 70 Stat. 983.

TITLE 49, CODE OF FEDERAL REGULATIONS

(as in effect in 1966)

PART 291—QUALIFICATIONS OF DRIVERS

Sec.

291.1 Compliance required.
291.2 Minimum requirements.
291.3 Driving experience.
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291.12 Carrier's right to require additional qualifications.
291.13 Driver's past record.

AUTHORITY: The provisions of this Part 291 issued under sec. 204, 49 Stat. 546, as amended; 49 U.S.C. 304, unless otherwise noted.

SOURCE: The provisions of this Part 291 appear at 32 F.R. 17942, Dec. 15, 1967, unless otherwise noted.

§ 291.1 Compliance required.

Every motor carrier, and his or its officers, agents, representatives, and employees who drive motor vehicles or are responsible for the hiring, supervision, training, assignment, or dispatching of drivers shall comply and be conversant with the requirements of this part.

§ 291.2 Minimum requirements.

Except as provided in paragraph (e) of this section, no person shall drive, nor shall any motor carrier require or permit any person to drive, any motor vehicle unless such person possesses the following minimum qualifications:

(a) *Mental and physical condition.* (1) No loss of foot, leg, hand, or arm.

(2) No mental, nervous, organic, or functional disease, likely to interfere with safe driving.

(3) No loss of fingers, impairment of use of foot, leg, fingers, hand or arm, or

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other structural defect or limitation, likely to interfere with safe driving.

(b) *Eyesight.* Visual acuity of at least 20/40 (Snellen) in each eye either without glasses or by correction with glasses; form field of vision in the horizontal meridian shall not be less than a total of 140 degrees; ability to distinguish colors red, green, and yellow; drivers requiring correction by glasses shall wear properly prescribed glasses at all times when driving.

(c) *Hearing.* Hearing shall not be less than 10/20 in the better ear, for conversational tones, without a hearing aid.

(d) *Liquor, narcotics, and drugs.* Shall not be addicted to the use of narcotics or habit-forming drugs, or the excessive use of alcoholic beverages or liquors.

(e) *Waiver of physical requirements.* Any person failing to meet the requirements of paragraph (a)(1) or (a)(3) of this section may be permitted to drive a vehicle, other than a vehicle transporting passengers, or a vehicle transporting explosives or other dangerous articles of such type and in such quantity as to require the vehicle to be specifically marked or placarded under the Explosives and Other Dangerous Articles Regulations (49 CFR 177.823) or when operating without cargo under conditions which require the vehicle to be so marked or placarded under the said regulations, if the Director, Bureau of Motor Carrier Safety, finds that a waiver may be granted consistent with safety and the public interest, and grants such a waiver, on the basis of an application meeting all of the following requirements:

(1) The application must be submitted jointly by a person seeking relief to permit him to drive and by a carrier wishing to employ such person as a driver, who both agree to fulfilling all conditions of the waiver;

(2) The application must be accompanied by reports of medical examinations satisfactory to the Director, Bureau of Motor Carrier Safety, and recommendations by at least two medical examiners, at least one of whom shall have been selected and compensated by the carrier. Such reports and recommendations must indicate the opinions of the medical examiners as to the ability of the driver to operate safely a commercial vehicle of the type to be driven by him.

(3) The application shall contain a description, satisfactory to the Director, Bureau of Motor Carrier Safety, of the type, size, and special equipment (if any) of the vehicle or vehicles to be driven, the general area and type of roads to be traversed, the distances and time periods contemplated, the nature of the commodities to be transported and the method of loading and securing them, and the experience (if any) of the applicant in driving vehicles of the type to be driven by him.

(4) The application shall specify agreement by both the person and the carrier that the carrier will file promptly with the Director, Bureau of Motor Carrier Safety, such periodic reports as are required and that such reports will contain complete and truthful information as to the extent of the person's driving activity, any accidents in which he may be involved, and any arrests, suspensions, or convictions in which the person is involved.

(i) If the applicant motor carrier is a corporation, the application shall be signed by a corporation officer and the applicant driver.

(ii) If the applicant motor carrier is a partnership, the application shall be signed by at least one of the partners and the applicant driver.

(iii) If the applicant motor carrier is a sole proprietorship, the application shall be signed by the proprietor and the applicant driver.

(5) The applicants shall agree that the waiver shall authorize driving in interstate commercial service for the applicant carrier only, that any arrests or convictions for violations of laws or ordinances, and any revocation or suspension of driving privileges will be reported to the Director, Bureau of Motor Carrier Safety, immediately on occurrence.

(6) The waiver shall not exceed 2 years and will be renewable, upon submission of a new application, if approved by the Director, Bureau of Motor Carrier Safety.

(7) The waiver may be suspended at any time at the discretion of the Director, Bureau of Motor Carrier Safety, and may be canceled by him after the applicant has been given reasonable opportunity to show cause, if any, why such cancellation should not be made.

(8) A copy of the letter granting the waiver under this section, or a legible photographically reproduced copy thereof, shall be retained in the files of the motor carrier at its principal place of business during the period the driver is in the carrier's employment and 12 months

after the termination of the driver's employment.

(g) Every driver granted a waiver under this section shall have in his possession while on duty a copy of the letter granting the waiver or a legible photographically reproduced copy thereof covering himself.

(Sec. 12, 80 Stat. 931; 49 U.S.C. 1651 note)

§ 291.3 Driving experience.

Every driver shall be experienced in driving some type of motor vehicle (including private automobiles) for not less than 1 year, including experience throughout the four seasons.

§ 291.4 Driving skill.

Every driver shall be competent by reason of experience or training to operate safely the type of motor vehicle or motor vehicles which he drives.

§ 291.5 Knowledge of regulations.

Every driver shall be familiar with the rules and regulations established by the Federal Highway Administration pertaining to the driving of motor vehicles.

§ 291.6 Age.

Every driver shall be not less than 21 years of age: *Provided, however,* That a person not less than 18 years of age may be permitted to drive a motor vehicle controlled and operated by any farmer and used in the transportation of agricultural commodities and products thereof from his farm or in the transportation of supplies to his farm, if such vehicle does not exceed a gross weight, including the load, of 10,000 pounds.

§ 291.7 Knowledge of English.

Every driver shall be able to read and speak the English language.

§ 291.8 Original physical examination of drivers.

No person shall drive nor shall any motor carrier require or permit any person to drive any motor vehicle unless such person shall have been physically examined and shall have been certified by a licensed doctor of medicine or osteopathy as meeting the requirements of § 291.2: *Provided, however,* That as to visual acuity, form field of vision, and ability to distinguish colors specified in § 291.2(b) examination and certification may be made by a licensed optometrist: *Provided further,* That this section shall not apply to drivers of motor vehicles controlled and operated by any farmer when used in the transportation of agricultural commodities or products thereof from his farm, or in the transportation of supplies to his farm.

§ 291.9 Periodic physical examinations of drivers.

Every driver shall be physically reexamined at least once in every 36 months and no person shall drive nor shall any motor carrier require or permit any person to drive any motor vehicle unless such person shall have been physically examined and certified by a licensed doctor of medicine or osteopathy as meeting the requirements of § 291.2: *Provided, however,* That as to visual acuity, form field of vision, and ability to distinguish colors specified in § 291.2(b) examination and certification may be made by a licensed optometrist: *Provided further,* That this section shall not apply to drivers of motor vehicles controlled and operated by any farmer when used in the transportation of agricultural commodities or products thereof from his farm, or in the transportation of supplies to his farm.

§ 291.10 Certificate of physical examination.

If a physical examination is required by § 291.8 or § 291.9 (formerly § 191.8 or § 191.9) every motor carrier shall have in its files at its principal place of business for every driver employed or used by it a legible certificate of a licensed doctor of medicine or osteopathy based on a physical examination as required by §§ 291.8 and 291.9 or a legible photographically reproduced copy thereof: *Provided, however,* That as to visual acuity, form field of vision, and ability to distinguish colors specified in § 291.2 (b) examination and certification may be made by a licensed optometrist; provided further that a motor carrier may upon written request to and upon receiving consent from the Director, Bureau of Motor Carrier Safety, Federal Highway Administration, Washington, D.C. 20591, retain such certificates at such regional or terminal offices as are proposed by the carrier and approved by the Director. Every driver, if a physical examination is required with respect to him by §§ 291.8 and 291.9, shall have in his possession while on duty, such a cer-

tificate, or a photographically reproduced copy thereof covering himself.

(Sec. 12, 80 Stat. 931; 49 U.S.C. 1651 note)

§ 291.11 Doctor's certificate.

The doctor's certificate shall certify as follows:

DOCTOR'S CERTIFICATE

This is to certify that I have this day examined _____ in accordance with section 291.2 and the physical examination procedure prescribed by the Motor Carrier Safety Regulations of the Federal Highway Administration, and that I find him qualified under said rules.

(Date) (Place)

(Signature of driver)

(Address of driver)

(Signature of examining doctor)

(Address of doctor)

The following shall be completed to show compliance with the eyesight requirements of section 291.2.

☐ Qualified when not wearing glasses.
☐ Qualified only when wearing glasses.

(Signature of (check one): ☐ Doctor ☐ Optometrist)

(Address)

NOTE: Stocks of doctor's certificates in the possession of carriers or their suppliers as of the effective date of this order may be used until January 1, 1969, provided the information required by section 291.11 is entered thereon.

Such certificate shall be based on a physical examination made and recorded generally in accordance with the following instructions and examination form.

GENERAL INSTRUCTIONS FOR MAKING PHYSICAL EXAMINATION AND RECORDING FINDINGS

[Be sure to record an answer to each question. When negative or positive, so state]

MEDICAL HISTORY

The purpose of this physical examination is to detect the presence of physical and mental defects of such a character and extent as to affect the applicant's ability to operate safely a motor vehicle. The examination should be made carefully and at least as complete as is indicated by the attached form. Defects may be recorded which do not, because of their character or degree, indicate that a certificate of physical fitness should be denied. The presence, however, of these defects should be discussed with the applicant and he should be encouraged to take the necessary steps to insure correction particularly of those which if neglected might lead to a condition likely to affect his ability to drive safely. Careful inquiry regarding past illness, the character and date of such illness, may reveal cause for defects found upon physical examination. Lack of knowledge concerning the etiology of certain defects may result in the rejection for employment. Such data also may indicate the need for making certain laboratory tests.

General appearance and development: Note marked underweight or overweight; any posture defects; perceptible limp, anemia, tremor, or other form of nervousness such as might be caused by chronic alcoholism, thyroid intoxication, or other illnesses. The regulations of the Federal Highway Administration provide that no driver shall be addicted to the use of narcotics or habit-forming drugs, or the excessive use of alcoholic liquors or beverages.

Head—Eyes: The telebinocular, Snellen chart, and other approved tests may be used to measure visual acuity. It is desired, however, when other than the Snellen chart is used, that the results of such test be expressed in values comparable to the standard Snellen test. If applicant wears glasses, these should be worn while applicant's visual acuity is being tested. Indicate on record by striking the inapplicable phrase on form "without glasses" or "with glasses if worn." In recording distance vision use 20 feet as normal. Report all vision as a fraction with 20 as numerator and the smallest type read at 20 feet as denominator. Note ptosis, discharge, corneal scar, exophthalmos, or strabismus uncorrected by glasses.

Ears: Note evidence of mastoid or middle ear disease; discharge. In recording hearing, record 20 feet as normal distance for conversational voice and record deviation from normal as fraction with 20 feet as denominator and actual distance as numerator.

Mouth: Note evidence of infection, pyorrhea.

Throat: Note evidence of disease, enlarged or infected tonsils.

Thorax—Heart: Stethoscopic examination is required. Note murmurs and arrhythmias. Electro-cardiogram is required when other findings indicate desirability.

Blood pressure: May be recorded with either spring or mercury column type of sphygmomanometer.

Pulse: Normal pulse taken after being seated at least 2 minutes, then have applicant stand and placing one foot on the seat of an ordinary chair raise his body to an erect position 20 times in 30 seconds. Pulse rate should return to his normal after 2 minutes' rest. Because of abnormal conditions, some applicants will be unable to do this. This test has been found helpful in ascertaining physical ability for work.

Lungs: It is necessary that the auscultatory cough be used. Tuberculosis, if suspected, state whether active or arrested, and

If arrested, your opinion as to how long it has been quiescent. Sputum to be examined for tubercle bacilli in all suspected cases.

Abdominal.—Scars: If present, state whether recent and if abnormally tender or if there is any evidence of hernia at the site of scar.

Abnormal masses: If present, note tenderness and whether or not individual knows when they have been present.

Tenderness: When noted, state where most pronounced and cause suspected.

Hernia: Note whether no hernia, but impulse on coughing; no hernia or impulse, but unusually large rings. Any hernia should be noted and if present, state whether it is retained by well-fitted truss.

Genito-urinary: When scars or urethral discharge are present, indicate patient's report for same and when indicated, submit smear of discharge to laboratory for examination.

Reflexes: If positive Rhomberg is reported, indicate degree. Pupillary reflexes should be reported for both light and accommodation. Knee jerks are to be reported absent only when not obtainable upon reinforcement and as increased when foot is actually lifted from the floor following light blow upon the patella; otherwise as normal.

Extremities: Be sure to record loss of foot, leg, fingers, hand or arm, or impairment of use thereof, or other structural defect or limitation, likely to interfere with safe driving.

Upper: Note deformities and limitation of motion.

Lower: Note deformities, limitation of motion; varicose veins.

In case of hand deformities, note particularly whether or not sufficient grip is present to enable driver to secure a grip on the wheel. Record chronic ulcers. Note any atrophy or paralysis.

Spine: Note deformities and limitation of motion.

Laboratory findings: Urine analysis is indicated whenever systolic blood pressure is over 150 and diastolic over 100 and such other times as medical history or findings upon physical examination may indicate that they are necessary. A serological test should always be taken in case of those giving history of luetic infection or present physical findings upon examination presenting possibility of latent syphilis.

Upon completion of the examination, physician should always date and sign his record of the same.

MINIMUM REQUIREMENTS OF § 291.2

(a) Mental and physical condition:

(1) No loss of foot, leg, hand, or arm.

(2) No mental, nervous, organic, or functional disease, likely to interfere with safe driving.

(3) No loss of fingers, impairment of use of foot, leg, fingers, hand or arm, or other structural defect or limitation, likely to interfere with safe driving.

(b) Eyesight: Visual acuity of at least 20 40 (Snellen) in each eye either without glasses or by correction with glasses; form field of vision in the horizontal meridian shall not be less than a total of 140 degrees, ability to distinguish colors red, green, and yellow; drivers requiring correction by glasses shall wear properly prescribed glasses at all times when driving.

(c) Hearing: Hearing shall not be less than 10 20 in the better ear, for conversational tones, without a hearing aid.

(d) Liquor, narcotics, and drugs: Shall not be addicted to the use of narcotics or habit-forming drugs, or the excessive use of alcoholic beverages or liquors.

PHYSICAL EXAMINATION OF DRIVERS

Date .....

Name .....
(Please print) (Last) (First) (Middle)

Present address .....
(Number) (Street)

.....
(City) (State)

.....
(Social Security Account No.)

Birth ..... Age .....
(Month, day, year) (Place)

HEALTH HISTORY

Yes	No	
☐	☐	Head or spinal injuries (severe).
☐	☐	Convulsions (fits, epilepsy).
☐	☐	Encephalitis (sleeping sickness).
☐	☐	Ever confined as chronic invalid.
☐	☐	Heart disease.
☐	☐	Tuberculosis.
☐	☐	Syphilis.
☐	☐	Gonorrhea.
☐	☐	Diabetes.
☐	☐	Stomach ulcer.
☐	☐	Rheumatic fever.
☐	☐	Asthma.
☐	☐	Kidney disease.
☐	☐	Suffering from incurable disease.
☐	☐	Permanent defect as result of disease or accident.

Other illnesses or injuries .....

PHYSICAL EXAMINATION

General appearance and development:

Good ..... Fair ..... Poor .....

Height ..... Weight .....

Head:

(Without glasses)

Eyes: For distance .....

Right 20/ ..... Left 20/ .....
(With glasses if worn)

Evidence of disease or injury:

Right ..... Left .....

Color vision ..... Horizontal field of vision:

Right .....° Left .....°

Ears: Hearing, 20 feet:

Right ear ...../20. Left ear ...../20.

Disease or injury .....

Mouth ..... Throat .....

PHYSICAL EXAMINATION—Continued

Thorax:
Heart ----------
If organic disease is present, is it fully compensated? ----------
Blood pressure (sitting):
Systolic ---------- Diastolic ----------
Pulse: Before exercise ----------
Two minutes' rest after exercise ------
Lungs: ----------
Abdomen:
Scars ------- Abnormal masses --------
Tenderness ----------
Hernia: Yes ---- No ---- If so, where? ---
Is truss worn?----------
Genito-Urinary:
Scars--------- Urethral discharge---------
Reflexes:
Rhomberg ----------
Pupillary --------- Light R ------- L ------
Accommodation R ---------- L ----------
Knee Jerks:
Right: Normal... Increased... Absent...
Left: Normal.... Increased.... Absent....
Extremities:
Upper ----------
Lower ----------
Spine ----------
Laboratory findings:
Urine: Sp. Gr.------- Alb.------- Sugar-----
Blood Serology----------
Chest X-ray----------

(Date)

(Examining doctor)

(Address)

§ 291.12 Carrier's right to require additional qualifications.

Nothing contained in Parts 290–297 of this subchapter shall be so construed as to prevent a motor carrier from requiring additional or more stringent physical, mental, or intellectual qualifications or age requirements than prescribed in this part as minima; or to require more frequent or more stringent physical or mental examinations than prescribed in this part, notwithstanding that a driver may have in his possession a doctor's certificate as herein required.

§ 291.13 Driver's past record.

In addition to the other qualifications required by this part, motor carriers shall in the employment and use of drivers and from time to time thereafter in continuing drivers in their service give due consideration to the following factors where they exist:

(a) Violations of laws or regulations governing the operation of motor vehicles of which the driver is guilty, especially as to those violations which tend to establish a disregard for regulatory requirements and for the public safety.

(b) The driver's accident record insofar as it tends to establish a lack of concern for or indifference to his own or the public's safety.

(c) Violations of criminal laws of which the driver is guilty, especially with respect to those offenses which tend to demonstrate his unfitness in the public interest to be a driver of a motor vehicle in interstate or foreign commerce.

Motor carriers shall maintain and preserve as a part of each driver's personnel record a summary of all driver acts and offenses which are within the purview of this section. In addition to the periodic review of such records as contemplated by this regulation, motor carriers shall specifically review the individual record of a driver when he is involved in a serious accident to the end that reckless or accident-prone drivers may not continue to drive vehicles as a hazard to the public safety.

Rule 15.

AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

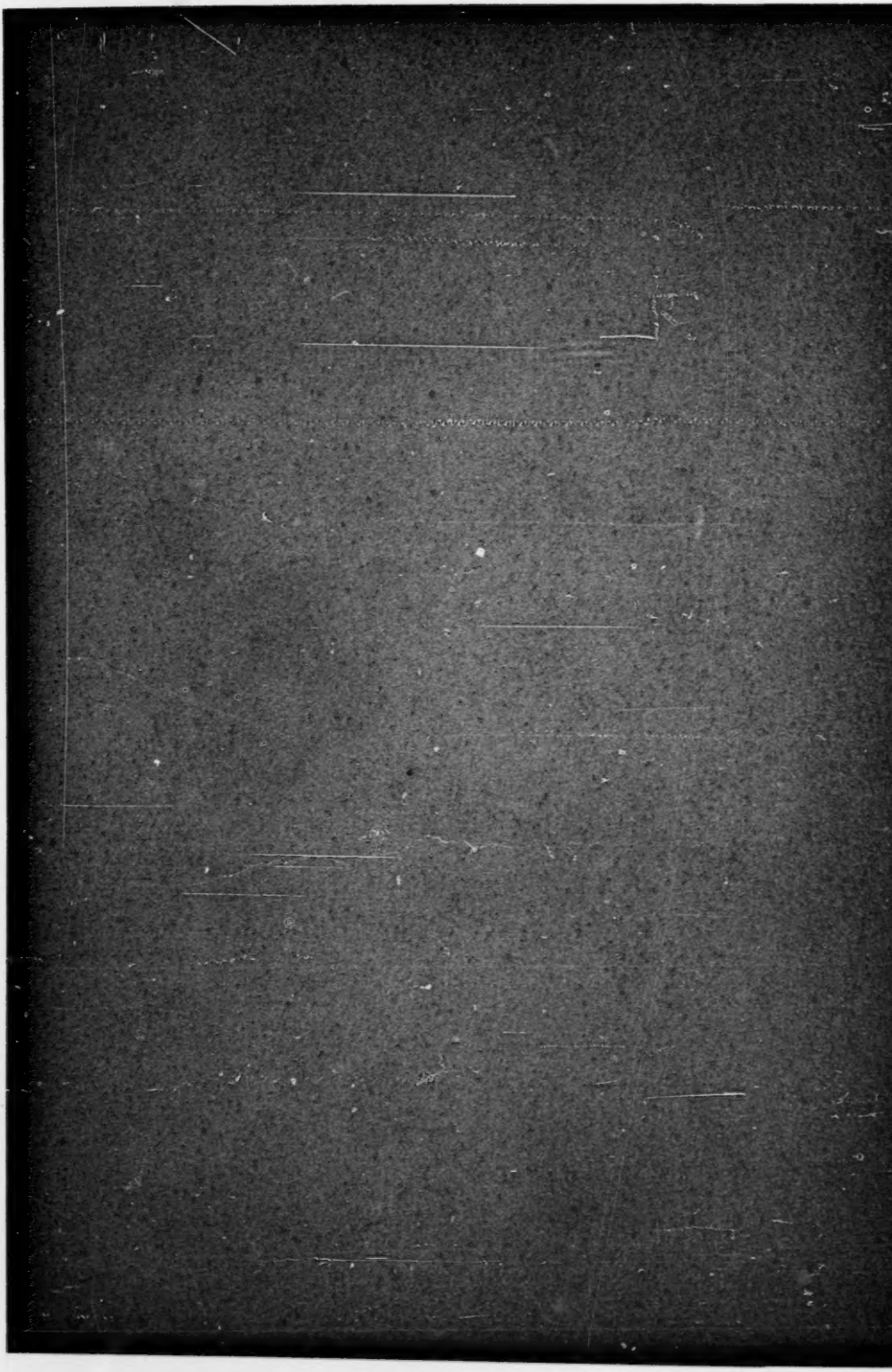
APPENDIX C 4

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.



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IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-6

ANCHOR MOTOR FREIGHT, INC.,
Petitioner,

vs.

WILLIAM SCOTT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF WILLIAM SCOTT IN OPPOSITION

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BRIEF OF WILLIAM SCOTT IN OPPOSITION

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. When an employer, acting in bad faith in order to terminate an employee it dislikes, coerces a company doctor to change his professional opinion and erroneously declare, contrary to medical knowledge, that the employee is not qualified to drive, may the court sustain a jury verdict holding the employer to have acted unjustly in breach of a labor agreement which forbids wrongful discharge?

2. Where the union controls the grievance procedure and where the jury found that the employee complied with the procedure by filing his grievance with the union by certified mail and that the union was guilty of unfair representation, was there sufficient evidence of a reasonable attempt to exhaust remedies as to permit suit against the employer for breach of contract under the doctrine of *Vaca* v. *Sipes*?

STATEMENT OF THE CASE

This was an action for wrongful discharge in breach of a labor agreement.

Plaintiff William Scott had thirteen years seniority as a truck driver for Defendant Anchor at the time of his discharge in July, 1966. Through diet, oral medication and an understanding of his condition, Scott had been able to control his mild diabetes, which had never interfered with his driving (203).[1] Each and every year since the onset of diabetes in 1959, he had met ICC standards and was certified as a qualified driver (200) and his condition was well known by the company (204).

On May 6, 1966 and again on June 21, 1966, he was examined by the company doctor, Louis Ralston, and found to be qualified under ICC rules and was given an ICC certificate (220, 602, 603). On July 6, 1966, Dr. Ralston wrote:

> "He is qualified as a driver under normal ICC requirements." (604).

The company was angry at Scott because he had recently filed ten pay claims and other miscellaneous complaints

[1] References are to the pages of the trial transcript reproduced in the joint appendix in the Court of Appeals.

with the company (222-229, 619). His disputes with the company reached a climax on June 17, 1966, when he was reprimanded for alleged "insubordination" (491).

Company officials were anxious to get rid of Scott. They were not satisfied with the doctor's admonition that if the company wanted to fire Scott, it would have to impose "more rigid requirements than the minimum ICC requires." (604). Company Safety Director Thomas then suggested to his assistant that "he contact Ralston to see if he would change his doctor's statement" (483-484).

Thomas wrote:

> "I suggested to Bob (DeLeo) that he contact Dr. Ralston to see if he would want to change his statement concerning the driver's qualifications . . . it is my opinion that Dr. Ralston will want to change his opinion . . ." (634).

Thomas's insistence that the doctor change his opinion was not based on any medical wisdom possessed by Anchor officials, who admitted they knew nothing about diabetes or the details of Scott's condition (509, 482, 489, 515). The jury could reasonably infer that the motive for pressuring the doctor was the company's dislike of Scott.

In any event, Dr. Ralston succumbed to the pressure from Anchor and wrote a letter alleging that Scott's oral medication could cause adverse effects which would make him a safety hazard. This opinion was contrary to medical knowledge and ICC practice and was promulgated without any new examination or new facts or investigation and was at odds with his previous report. Within a few hours after receipt of the new report, the company fired Scott, without any further background inquiries or investigation or opportunity for Scott to explain his condition or "warning notice of the complaint" as required by Article 32 (608).

At the time of the discharge, there was a "sweetheart" collusive relationship between the company and union (Local 377 Teamsters) (58). The union was providing virtually no representation. There was no steward or grievance committee operating, even though sanctioned by contract (209, 399, 471, 543). The Court of Appeals noted that at the time "Local 377 did not have the requisite machinery to process a grievance." Neither the company nor union had distributed copies of the labor agreement to the drivers and none were available (471, 543). Union representatives Angelo and Schwartz, who subsequently were convicted of federal crimes (139), had received personal favors from the Anchor terminal manager (62, 63, 114, 115). Angelo had shown personal hostility to Scott and the Anchor drivers from Ohio and Kentucky, whom he called "hillbillies" (233, 542).

Immediately after his discharge, Scott went to the company premises to protest the discharge, left his name, and was denied access (234). During the two weeks following his discharge, the company terminal was shut down because of vacation (89).

In accordance with normal practice, Scott filed several copies of his grievance with the union and requested a hearing (621, 528, 532). He understood that the union would file a copy of the grievance with the company, and the union assured him he would get a hearing (238, 313, 155). The union received the grievance by certified mail, within a sufficient time to file a timely grievance with the company (624). During the weeks and months after his discharge, Scott made inquiries concerning his grievance (212, 238, 313, 152, 320, 541.) In 1967, Scott wrote to the company and union requesting information regarding the status of the grievance (617). Neither company nor union replied. The union, during all this time, had failed to file

the grievance with the company or request a hearing and had totally failed to provide any help or representation for Scott.

Suit for breach of contract and unfair representation was filed April 4, 1968. Trial was held in August, 1972.

At the trial, two expert diabetes specialists testified that Dr. Ralston's opinion was one hunderd percent contrary to medical knowledge and that Scott's oral medication did not pose any real danger for a driver (333, 334, 350-53, 390-93) and that Scott was qualified under the standards which the ICC was using. Those practices appear in the current ICC regulations:

> "If mild diabetes is noted at the time of the examination and is stabilized by use of a hypoglycemic drug and a diet that can be obtained while a driver is on duty, it should not be considered disqualifying (Section 391.43 (c), Title 49, Chapter I, Part 391, Subpart E)."

The company did not offer any expert medical opinion to refute plaintiff's experts.

At trial, Mr. Baccei, the ex-ICC man, admitted telling Dr. Ralston that oral medication should not be considered disqualifying (462). He also admitted that the ICC made no ruling in Scott's case (463). At trial, it was shown that another driver, Jones, who had more severe diabetes than Scott, was temporarily disqualified for a few days by Dr. Ralston but was not fired and was subsequently qualified (93-95, 220-221, 615).

Thus, there was powerful evidence of a pretextual discriminatory discharge. The jury could have found that Scott was fired because he was a "trouble maker" and not because of diabetes.

Plaintiff argued that, as a matter of law, he had satisfied the requirements of the *Republic Steel* v. *Maddox*, 392 U.S.

652 (1969), since Scott had clearly made a good faith "attempt to use the contract grievance procedure" and he afforded the union every "opportunity to act on his behalf." Defendants disagreed, arguing that Scott had not followed the contract procedures in a timely manner. The Court submitted the timeliness and exhaustion issues to the jury.[2] The jury agreed with plaintiff's version of the facts and also found that the union had breached its duty of fair representation.

The jury found the company discharged plaintiff without just cause and returned a verdict of $12,500.00 from which judgment defendant Anchor now appeals.[3]

ARGUMENT

A. THERE WAS NO CONFLICT BETWEEN THE JUDGMENT OF THE COURT AND THE RULES OF THE I.C.C.

Scott claimed that he was unjustly discharged in breach of the labor agreement which provides that the employer shall not discharge an employee "without just cause" and that if there is an "injustice" the employee shall be reinstated (Article 32, 608).

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[2] For another case where the exhaustion issue was submitted, to the jury see: *Smith* v. *Pittsburgh Gage & Supply Co.*, 464 F.2d 870 (CA 3, 1972).

[3] The trial consolidated plaintiff's separate claim against the union for unfair representation. The jury returned a verdict for $12,500.00 against the union. The Court of Appeals affirmed the judgment of liability but ordered a new trial on the issue of damages and attorney fees. The union has indicated an intent to petition this Court concerning the damage issue. (Case No. A-1348)

Any question of medical fitness for work is subject to the grievance and arbitration procedures (Article 34; 609, 117-118). Arbitrators, as a matter of course, review questions of medical fitness in cases where truck drivers subject to ICC regulations have been discharged, *Texas Lime*, 49 L.A. 403 (Emery, Arbitrator, 1967), *Expert Dairy Service, Inc.*, 45 L.A. 217 (1965), *Spector Freight System, Inc.*, 34 L.A. 149 (1960), *Fontaine Truck Equipment Co.*, 38 L.A. 829 (Petree, Arbitrator, 1962), *Associated Transport, Inc.*, 32 L.A. 152 (Campbell, Arbitrator, 1959). In a Section 301 breach of contract case, the court and jury perform the functions normally performed by the arbitrator.

Defendant's position, that the unilateral and clearly erroneous determination of a company controlled doctor shall govern the issues in this case as a matter of law, is completely at odds with well settled principles of labor relations subjecting such decisions to legal review under the contract grievance machinery. See, for example, *Ideal Cement Co.*, 20 L.A. 480 (Merrill, Arbitrator, 1953) (an employee cannot be summarily discharged simply on the basis of a letter from a company physician), *Instant Milk*, 24 L.A. 756 (Anderson, Arbitrator, 1955) ("management must accept the responsibility" where "a medical examination given by the company's physician is proved to be mistaken.")

The employer argued to the jury and now to this Court that it was "compelled" by the ICC to discharge Scott and forever deprive him of this seniority and pension rights. The jury rejected the employer's version of the facts and agreed with plaintiff that the "ICC" defense was pretextual and plain nonsense. Scott was fired, not because of diabetes or ICC rules, but because of Anchor's desire to rid itself of a fighter who stood up for his contractual rights. There was a mountain of evidence that Dr. Ralston's opinion was coerced and was fraudulent, and that Anchor

never really believed that Scott was unfit under ICC rules. Furthermore, the uncontradicted medical testimony showed that the taking of oral medication does not create a safety problem, and that a mild diabetic, like Scott, who is well controlled, did, in fact, meet ICC criteria. Thus, there was no conflict between contractual and ICC obligations.

A case directly in point is *International Auto Sales* v. *Local 270,* 313 F. Supp. 313 (E.D. of La., 1970). The arbitrator found that a discharged employee was medically fit under ICC rules and that the employer's purpose in requiring a physical examination was "a subterfuge to rid themselves of an employee who they decided they could do best without." As in the case at bar, company officials wrongfully instructed the doctor to find the employee not qualified. The court refused to vacate the arbitration award, in spite of the company's argument that the arbitrator's order of reinstatement would cause the company to violate ICC safety regulations.

The case of *Miller* v. *ICX,* 358 F. Supp. 1378 (D.C. Ill., 1972) cited by defendant actually helps plaintiff's position. In *Miller,* plaintiff had a history of diabetes "which required insulin for control." Insulin using diabetics are disqualified under ICC rules (461). Scott, unlike Miller, never used insulin and he was therefore not subject to insulin shock or convulsions. Scott, as a mild, non-insulin using diabetic, was qualified by under ICC rules (333-353, 391-393). In additioni, there was no evidence in the *Miller* case of a pretextual discharge or improper attempts to coerce a doctor in order to get rid of an employee disliked and unwanted for reasons unrelated to medical fitness.

Furthermore, the issues under ICC rules as to driving and the issues under the labor agreement are not identical. Anchor's arguments overlook the obvious fact that ICC rules do not require or even discuss discharge or loss of

seniority rights. The normal employer disposition of a health problem would be a temporary suspension or leave of absence in order for the employee to become rehabilitated, as was done in the case of diabetic Jones (93-95, 615). However, Anchor summarily discharged Scott without such consideration or any attempt to find him temporary light work or a non-driving position as a yard or dock man while receiving treatment. Furthermore, the ICC never made any ruling or issued any order concerning Scott, and in fact his ICC certificate has never been revoked.

The decision of the court and jury is totally in harmony with ICC regulations and there is no conflict of any kind presented by this record.

B. PLAINTIFF MADE A REASONABLE ATTEMPT TO INVOKE THE GRIEVANCE PROCEDURE.

Defendant concedes on page 23 of its brief that "where the union has sole and exclusive control over access to steps of the grievance machinery and where unfair representation is proven, an employee is entitled to some protection." Such concession of course, is required by the language of this court in *Vaca*:

> "We think that another situation where the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure *and* if as is alleged here, the employee plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance.
>
> * * *
>
> "For these reasons we think the wrongfully discharged

> employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contract remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." *Vaca* v. *Sipes*, 386 U.S. at 171.

In the case at bar, the "*union*" (not the employee) had the sole and exclusive right to request a "hearing" as to an employee's discharge (Article 32, 608). The contract speaks of the "employee's right (not on his own, but) through the *union* to challenge a penalty through the regular grievance procedure" (611). Article 34 gives the *union* (not the employee) the right to obtain a medical examination if the *union* (not the employee) believes there is an injustice (609). Thus, the *union* (not the employee) controlled all the steps of the grievance procedure by which Scott could protest a wrongful discharge because of alleged medical unfitness.

The jury correctly concluded that Scott, by mailing several copies of his grievance by certified mail, well within the ten day period, had substantially satisfied the contract's requirements concerning the taking of an appeal under Article 32. At the time of his discharge, there was no steward and no union committee available to help Scott. In addition, the terminal was shut down and the other union members were on vacation. By filing copies of his grievance with the union, Scott followed normal practice and took the most logical and reasonable step to ensure that his grievance would receive a hearing. Since the union controlled the employee's ability to protest the discharge penalty, obtain a hearing and obtain an impartial medical examination, Scott's efforts directed toward the union constituted a reasonable attempt to comply with the contract under the *Maddox-Vaca* doctrine.

It is true that the *Vaca* doctrine may result in the employer being faced with a lawsuit, without prior notice in the grievance procedure. The reason for the exception to the exhaustion doctrine was stated by this court in *Vaca*:

> "Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in enforcement of such agreements." 386 U.S. 186.

Post-*Vaca* cases have excused employees from rigid compliance with the technicalities of grievance procedures, where, as here, there is a breach of fair representation, *Retana* v. *Apt., Motel and Elevator Operators Union Local 14,* 453 F.2d 1018, (CA 9, 1972), *DeArroyo* v. *Sindicato de Trabajordes Packinghouse,* 425 F.2d 281 (CA 1), cert. denied 400 U.S. 877 (1970), *Williams* v. *Dana Corp.,* 442 F.2d 412 (CA 6, 1971), *Schum* v. *South Buffalo Railway Co.,* 73 L.C. 14,492 (CA 2, April, 1974). In all of the above cases, the employee filed his grievance with the union, but not the employer and the court nevertheless found standing to sue the employer because of the unfair representation. The rationale stated in *Schum* applies with equal force in the Scott case:

> "Here Schum properly invoked the union's power, aid and prestige to obtain the benefits of union representation in his protest against the wrongful discharge. Reassured on several occasions by union officials that his grievance would be processed administratively, Schum understandably left the matter in the hands of the union. He did not learn of the union's lack of diligence until months after he had lost the right to resort to the contractually-prescribed procedures on his own. Under these circumstances, Schum cannot be denied his day in court against his employer be-

cause his union failed to provide his fair representation. As stated by the Supreme Court in *Vaca*:

> 'It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstances would, in our opinion, be a great injustice.' . . . 386 U.S. 185-186."

The employer cannot seriously complain of prejudice in the case at bar. Anchor was verbally notified of Scott's protest on the day after his discharge when he visited the company premises (234), and again when the union inquired concerning his case in August, 1966 and finally in 1967 when Scott wrote the company (617). Anchor made no inquiries or efforts to contact Scott. In addition, the employer, which (1) maintained a "sweetheart", collusive relationship with the union, (2) violated the procedures of the labor agreement by failing to issue a pre-discharge warning notice (Article 32, 608), and (3) acted fraudulently with respect to the discharge, is estopped from complaining concerning any technical deficiencies. In addition, the bad faith posture of both employer and union during this period when the grievance machinery was inoperative, brings into play the "futility" doctrine set forth in *Glover* v. *St. Louis-S.F. Ry.*, 393 U.S. 324 (1969) ("where the effort to proceed formally with the contractual or administrative remedies would be wholly futile.")

Scott is a third party beneficiary of the employer's prom-

ise to treat its employees with justice. It is only because of the union-sponsored grievance machinery that the "exhaustion" requirement was developed. Where the machinery breaks down, where the union fails to provide fair representation or where collusion and employer bad faith renders utilization of the procedure futile, the reason and purpose behind the necessity for the exhaustion rule vanish. So it was in the Scott case. The aggravated fact pattern — showing hostility and bad faith on the part of both the employer and the union — provides a classic example of why an employee should be allowed to sue on the contract under the *Vaca* doctrine.

C. THIS APPEAL FROM A JURY VERDICT IS INAPPROPRIATE FOR CERTIORARI.

The basic issues in this case were factual, not legal. Defendant says there was a conflict between the ICC and the court. Yet the ICC made no determination of any kind as to Scott's fitness. In addition, there was no medical testimony refuting plaintiff's two experts who testified that Scott's condition did not present safety problems or violate ICC standards. Furthermore, there was evidence that Scott's discharge was pretextual and completely unrelated to health or ICC regulations. Thus, the purported conflict between ICC law and the law of labor agreements, which defendant claims might be of interest to this Court, is not even present in the case at bar.

Similarly, no important issue concerning exhaustion of remedies doctrine is posed in this case. Exhaustion is not required where, as here, union unfair representation prevents the employee from obtaining relief under a union-controlled grievance procedure. In any event, the jury

found that Scott complied with the contract's provisions concerning timeliness of appeal. Thus, the jury, in effect found that Scott did exhaust grievance remedies. In view of the jury finding of unfair representation and the cases allowing suit for breach of contract under these circumstances, this appeal presents no new, unusual or important issues for this Court.[4] Furthermore, the decision of the court below is not in conflict with any decision of this Court, and there is no conflict of law between the Circuits on the rules of law governing this case.

CONCLUSION

This record displays one of the most flagrant cases of wrongful discharge and unfair representation in the annals of post-*Vaca* reported cases. Evidence of collusion and subjective bad faith on the part of both company and union officials permeate the transcript.

The jury could have found a pretextual bad faith discharge in which the company deliberately pressured its doctor to alter his professional opinion to produce a result one hundred percent at odds with medical knowledge. There was no conflict between ICC rules under which Scott as a mild, non-insulin using diabetic, had been qualified for years, and the labor agreement, which requires an employer to treat his employee justice. Under *both* ICC and contract rules, Scott was a qualified driver and was treated unjustly by Anchor.

Scott, by filing his grievance with the union, followed normal practice. Since the union had control of his ability

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[4] The questions defendant seeks to present in its third and fourth arguments were not raised in the court below and are so obviously inappropriate for certiorari and so obviously frivolous as to not deserve reply.

to obtain relief under the contract, filing with the union constituted a reasonable attempt to exhaust remedies. The jury's findings of (1) unfair representation and (2) timely compliance with the grievance procedure allows plaintiff to sue for breach of contract under the principles set forth by this Court in *Vaca, Maddox* and *Glover*.

No important legal issues are raised by this appeal from a jury verdict involving questions of fact.

For all these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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